United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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74-1664

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 74-1664

RAYMOND ARGRO,

Appellee,

v.

UNITED STATES OF AMERICA,

Appellant.

Appeal from the United States
District Court for the Eastern District
of New York

(John F. Dooling, Jr., Judge)

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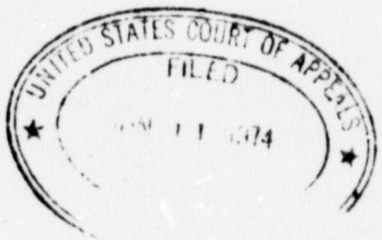

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ISSUES PRESENTED

I. Whether the court erred in requiring the United States Board of Parole to conduct a local parole revocation hearing for a parolee convicted of an intervening state offense.

II. Whether the court erred in admitting petitioner to bail pending the outcome of his state court appeal.

PRELIMINARY STATEMENT

This is an appeal by the United States from an order from the United States District Court for the Eastern District of New York (Dooling, J.) entered on February 1, 1974. Upon the application of petitioner, Argro, the court ordered the respondent to conduct a local hearing for the purpose of revoking petitioner's federal parole. The court further ordered petitioner released on bail pending the disposition of his state appeal of the conviction which would presumably have served as the basis for his parole revocation.

The United States takes this appeal on behalf of the United States Board of Parole because of the extreme hardship the decision will impose upon the Board. The order, by requiring local parole revocation hearings, will force Board members to visit a virtually infinite number of localities in order to hold innumerable local hearings. Appellant contends that the court's reliance on rules of the United States Board of Parole and Morrissey v. Brewer, 408 U.S. 471 (1972) for its venue ruling is invalid. The United States also appeals on the grounds that the court's order admitting Argro to bail was improper and constitutes an abuse of discretion which will greatly complicate the administration of the parole system and provoke false hopes on

the part of other parole violators who have not previously been considered bailable.

STATEMENT OF FACTS

Petitioner Argro pled guilty to a violation of 18 U.S.C. § 2113 and, on February 28, 1967, was sentenced to a term of 15 years pursuant to 18 U.S.C. § 4208(a)(2). He was released on parole November 23, 1970.

On June 21, 1972, petitioner was arrested in Binghamton, New York, for the possession of a narcotic drug. On July 19, 1972, the Board of Parole issued a violator's warrant pursuant to 18 U.S.C. §4205. The warrant charged Argro with certain parole violations, to wit: (1) possession of a dangerous drug on June 21, 1972; (2) possession of a .22 caliber pistol on May 29, 1972 (two counts); (3) association with a person engaged in criminal activity; and (4) leaving the district without permission of the United States Parole Officer. At the time the warrant was issued, Argro was free on bail for the state charge. Argro was convicted by the state court and sentenced to serve a term of five years. His bail was continued pending the appeal of his conviction and has not yet been decided.

On November 27, 1973, federal authorities executed the outstanding parole violator's warrant by arresting

petitioner at his place of employment. Thereafter, he was given two interviews with Miss Beverly F. Greene, United State Probation Officer and later informed that he would be removed to the Federal Correctional Institution at Lewisburg, Pennsylvania, wherein his revocation hearing would be held. Argro obtained a stay of the Board of Parole's order on December 21, 1973, from the United States District Court for the Eastern District of New York. He remained incarcerated at the Federal House of Detention in Manhattan until admitted to bail by Judge Dooling, March 4, 1974.

ARGUMENT

I.

THE COURT ERRED IN REQUIRING THE BOARD OF PAROLE TO CONDUCT A LOCAL PAROLE REVOCATION HEARING

In holding that petitioner Argro is entitled to a local revocation hearing, the court first found fault with the preliminary hearing accorded Argro immediately after his arrest. (A 49-51) It then cited Morrissey v. Brewer, supra, and Gagnon v. Scarpelli, 411 U.S. 778 (1973) for the proposition that:

> [I]t is not apparent that interests of due process will in every case be adequately served by institutional hearing where, at least, the alleged parole violator is able to show that factors in mitigation can in

> his case best be demonstrated at a place nearer to his residence and work place during release, and nearer to the place of the alleged violation, provided no inordinate administrative inconvenience is imposed. (A 54)

Although it is unclear from the opinion, the court, having taken into account the claims of shortcomings of the preliminary interviews and the Morrissey and Gagnon decisions, appears to base its venue decision primarily upon its own interpretation of Board of Parole rules. Specifically the court concludes that:

> [T]he conviction in the Binghamton Court is not, since it is not a final judgment of conviction, because of the pending appeal, such a conviction as precludes a local hearing under [28 C.F.R.] §2.43(b)(2).... (A 56)

The government submits that the court erred in its interpretation upon §2.43(b)(2) or in basing its opinion on the standards of due process announced in Morrissey and Gagnon.

A.

Board of Parole Regulations Concerning Venue for Revocation Hearings Are Not Dependent Upon State or Federal Convictions Affirmed on Appeal

According to revisions in Board of Parole procedures announced September 24, 1973 (38 Fed. Reg. No. 184) 28 C.F.R. §2.43:

> (b) If the prisoner requests a local hearing prior to his return to a Federal

> institution, he shall be given a revocation hearing reasonably near the place of an alleged violation if the following conditions are met: (1) The local hearing would facilitate the production of witnesses or the retention of counsel; (2) the prisoner has not been convicted of a crime committed while under community supervision; and (3) the prisoner denies that he has violated any condition of his release. Otherwise, he shall be given a revocation hearing after he is returned to a Federal institution. [emphasis added]

The court interpreted this provision to refer only to convictions which have been affirmed on appeal.

> It must be supposed that Rule 2.43(b)(2) means such a conviction as puts guilt, and therefore parole violation, beyond question, and, hence, leaves open only the Board's determination to reinstate, revoke or modify the parole terms and conditions. (A 47)

This supposition is erroneous. The language of §2.43(b) is clear on its face. Petitioner Argro had been convicted of an intervening offense and had admitted his conviction to the Probation Officer. (A 36) In order to sustain its burden of proof in the state criminal trial, the prosecution was required to show beyond a reasonable doubt that the defendant, Argro, committed the alleged offense. Without doubt this degree of certainty is sufficient to place the case within the parameters of § 2.43(b)(2).

In this regard it should be noted that the American Bar Association's Project on Standards for Criminal Justice merely recommends that probation revocation proceedings based solely upon the commission of another crime "should not be initiated prior to the disposition of that charge." Approved Draft, 1970, Probation §5.3. As an alternative to outright revocation, the report recommends "that the probation court be authorized to cause the confinement of the offender until the new charge has been processed to conclusion." Id. (See discussion of the propriety of bail under Point II.)

The thrust of § 5.3 is to insure that a supposed violator is not revoked without cause, a philosophy thoroughly adhered to in Argro's parole case.

An erroneous corrollary to the court's interpretation involves the impact of a reversal of the state conviction upon a federal parole revocation. According to the court, "...the revocation hearing held at the institution will retrospectively be set at naught in the case of a reversal." (A 47) This assumption is not necessarily valid. For example, the Board of Parole could reaffirm its revocation in the wake of a reversal based upon inadmissible evidence or testimony introduced at the

state trial; indeed, the Board could base its revocation on factors unrelated to the conviction.

B.

Neither Morrissey v. Brewer nor Gagnon v. Scarpelli Mandate a Local Revocation Hearing for a Parolee Convicted of an Intervening Offense

Although not explicit, the court appears to have been motivated by Morrissey v. Brewer, supra, and Gagnon v. Scarpelli, supra, in reaching its venue decision. In Morrissey, the Court held that an alleged parole violator is entitled to certain due process protection prior to having his parole revoked. Gagnon extended this protection to probation revocation proceedings and discussed the instances which an indigent subject might be entitled to counsel.

The court's decision in Morrissey may be said to rest largely upon the concept of deprivation of liberty. To the court, "the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others." 408 U.S. at 482. Hence, certain due process considerations must be taken into account before returning a parolee to an institution.

At some point the individual is entitled to state his case. Petitioner Argro has had such an opportunity. The Board of Parole is not attempting to summarily return him to prison, but instead is doing so only after he has been tried and convicted of a criminal offense. In Morrissey, the court carefully pointed out that:

> [o]bviously a parolee cannot relitigate issues determined against him in other forums, as in the situation presented when the revocation is based on conviction of another crime. 408 U.S. at 490; see also Hyser v. Reed, 318 F.2d 225 (D.C. Cir. 1963).

This language has recently been relied upon by the Fifth Circuit in Cook v. United States Attorney General, 488 F.2d 667 (1974). In Cook, a federal prisoner contended that Morrissey required the execution of a parole violator's warrant which was operating as a detainer while he was serving an intervening sentence. The court held that the Board of Parole is not required to conduct a revocation hearing at the commencement of a new prison sentence, notwithstanding the parolee's allegations of prejuduce.

The court (Brown, C.J.) pointed out that:

> Appellee did not even begin to demonstrate that he could have presented a stronger showing of mitigating circumstances supporting nonrevocation had the hearing been held earlier. (Slip Opn. at 280)

This language is clearly relevant to the instant case. Here the petitioner has not begun to demonstrate an ability to introduce facts of sufficient weight to avert a revocation. The charges against him were numerous; hence, the face that he might be able to apply mitigating evidence against one of the charges should not have been considered dispositive of the venue question.

One may infer from Cook that it is improper for a court to indulge in speculation concerning a parolee's ability to introduce evidence sufficiently substantial to avert revocation. See also, Burnett v. United States Board of Parole, No. 73-3135 (5th Cir., decided March 27, 1974) (following Cook, supra.) Yet this is apparently the tact taken by the court below.

Finally, appellant would make clear that the parolee in this case was granted a preliminary hearing "at or reasonably near the place of the alleged parole violation or arrest." Morrissey, supra, at 485. Hence, appellant is not asking the court to approve the practice of holding the preliminary hearing at the institution, a practice recently sanctioned by the New York Court of Appeals. People ex rel. Calloway v. Skinner, 33 N.Y.2d 23, 347 N.Y.S.2d 178, 184 (1973)(institution within 35 miles).

II.

PETITIONER WAS NOT ENTITLED TO BE RELEASTED ON BAIL PENDING THE OUTCOME OF HIS STATE APPEAL

In its order of February 1, 1974, the court below stayed Argro's removal to Lewisburg Federal Correctional Institution "pending determination of the question whether the parolee should be admitted to bail, and if so on what bail terms." (A 57) Subsequently, he was admitted to bail. (A 67-68 ~~58-59~~)

A.

The Court Lacked Jurisdiction to Grand Bail

According to the provisions of 18 U.S.C. §§4201-4207 the United States Board of Parole is charged with exclusive jurisdiction over the administration of the parole processes of the federal government. Accordingly, the court below had no authority to inject itself into parole revocation procedures absent a clear showing by the habeas corpus petitioner that his confinement was, in some way, illegal.

In a similar case, the California Supreme Court recently held that a habeas petitioner was not entitled to bail. In In re Law, 513 P.2d 621, 109 Cal. Rept. 573 (1973) (en banc), a parolee applied for a writ of habeas corpus based upon a contention that he was entitled to release

on bail while in custody pursuant to an arrest for a subsequent alleged offense. Bail was fixed for the latter charge, but the parolee remained in custody by virtue of a "parole hold" imposed by the California Adult Authority. After analyzing federal and state constitutional provisions and applicable state statutes, the court dismissed the petitioner's writ, holding that a parolee does not have a right to bail while in custody imposed by a "parole hold." 513 P.2d 621, 624. Significantly, the California case involved a parolee who had merely been arrested for a later offense. In the instant case the petitioner has been duly tried and convicted of a subsequent felony.

As emphasized by California's Chief Justice Wright:

> We have long recognized that an official accusation of a new criminal offense is sufficient grounds for restraining a parolee and that the exclusive jurisdiction over parolees has been vested in the [Adult] Authority. 513 P.2d 621, 624 (citations omitted; emphasis in original).

The California Court stressed that such determinations affecting parolees should not properly be made by the judicial branch.

> [T]o allow bail on the new offense to be grounds for release of a parolee would constitute an infringement upon a proper exercise of the statutorily declared exclusive jurisdiction of the Authority in the parole area. 513 P.2d 621, 624. (Compare 18 U.S.C. §4207 and Cal. Penal Code §5077 (West 1970).

In our view the California Supreme Court's analysis of the issue is correct. Since the constitutional and statutory provisions involved are extremely similar, we urge this court to adopt its reasoning. Certainly federal statutory provisions offer Argro no support. The Bail Reform Act of 1966, 18 U.S.C. § 3141 et seq. and relevant parole statutes, e.g., 18 U.S.C. §§ 4205-4207, cannot be deemed to provide authority for the court's action in admitting the petitioner to bail. Cf. In re Whitney, 421 F.2d 337 (5th Cir., 1970)(no eighth amendment right to bail for a probation violator).

It should also be noted that the New York Court of Appeals has quite recently rejected a similar argument made by a parole violator. In People ex rel. Calloway v. Skinner, 33 N.Y.2d 23, 347 N.Y.S.2d 178, 184 (1973), the court concluded that a parolee accused of a violation is not entitled to bail absent "a specific legislative direction." In so ruling the court cited with approval language in People ex rel. Little v. Monroe, 38 App. Div. 2d 398, 400, 330 N.Y.S.2d 221, 223 (1972):

> [T]he granting of bail in a parole revocation would create insuperable problems. The court granting bail is not in control of the proceedings--that is within the power of the board of parole. It is the province of the board to determine when the hearing shall be held. If the person accused of delinquence did not appear at the hearing, after notice, there is no

> procedure whereby bail would be revoked and the person restored to the custody of the board. Even to improvise a procedure by court rule or decision would be difficult, if attainable. Callaway, supra, at 374 N.Y.S.2d 184; see also January v. Porter, 75 Wash.2d 768, 453 P.2d 876 (1969) (writs of prohibition issued prohibiting court from admitting violator to bail); People ex rel. Johnson v. Pate, 47 Ill.2d 172, 265 N.E.2d 144 (1970); 8 C.J.S. Bail §36(8).

Again, this language is applicable to the instant case. The United States Board of Parole has the responsibility for protecting the public from the transgressions of parolees who breach their conditions of parole. That responsibility cannot be fulfilled if a trial court is permitted to arbitrarily admit an individual parole violator to bail. The practical effect on the system of such a practice would be particularly pernicious, for it would enable the parolee to escape timely sanction for his violation and thus continue to flaunt the law.

B.

Bail is Improper Where Success on the Merits Will Not Result in the Prisoner's Release

Historically a petition for a writ of habeas corpus is designed to secure the immediate release of the petitioner

from illegal confinement. Only the legality of the detention is relevant. Schattan v. United States, 419 F.2d 187 (6th Cir. 1969); Kelly v. Wingo, 313 F. Supp. 1059 (W.D. Ky. 1907); United States ex rel. Ali v. Deegan, 298 F. Supp. 398 (S.D. N.Y. 1969)(habeas relief not available to review questions unrelated to cause of detention): R. SOKOL, FEDERAL HABEAS CORPUS 34 (1969); see also Peyton v. Rowe, 391 U.S. 54, 58 (1968); Callanan v. United States, 274 F.2d 601, 605 (8th Cir. 1960), affirmed, 364 U.S. 587, rehearing denied, 365 U.S. 825 (prisoner's 28 U.S.C. § 2255 action dismissed; no claim of right to be released). Hence, "[w]here the restraint is justified the writ does not lie." 39 C.J.S. Habeas Corpus §13.

Recent Supreme Court cases dealing with habeas corpus provide no support for the propriety of outright release in this case. Argro's petition for a writ of habeas corpus differs substantially from that in issue in Preiser v. Rodriguez, 411 U.S. 475 (1973). There the Supreme Court held that habeas corpus was the proper remedy for a state prisoner complaining about the loss of good time. Petitioner Argro did not allege that he is entitled to release by virtue of an unconstitutional loss of good time credits. Nor does Argro's petition fall within the dictates of Jones v. Cunningham, 371 U.S. 285 (1963), which dealt with an unrelated

habeas challenge against the Board of Parole, or Peyton v. Rowe, 391 U.S. 54 (1968) in which the court held that prisoners serving consecutive sentences could attack sentences not yet begun to be served.

More recently the Seventh Circuit vacated a bail order issued by United States District Judge Miles Lord on the grounds that outright release was an improper remedy and that Judge Lord appeared to have granted bail to the inmate as a punitive measure against the Board of Parole. United States Board of Parole v. Lord, No. 73-1307 (7th Cir., July 6, 1973).

Assuming arguendo that the court below properly entertained Argro's motion pursuant to its habeas corpus powers, it could not legitimately find that the Board's continued custody of the petitioner was unlawful. In this case the Board had ample grounds for holding the petitioner--even assuming his state conviction might be eventually overturned. Hence, release on bail was unwarranted.

C.

The Court Applied Erroneous Standards in Admitting a Habeas Corpus Petitioner to Bail

Appellant recognizes that a United States District Court has the authority to release a habeas corpus petitioner

on bail in a properly brought proceeding. Johnston v. Marsh, 227 F.2d 528 (3d Cir. 1955); Sims v. Wainwright, 307 F. Supp. 116 (S.D. Fla. 1969); United States ex rel. Epton v. Nenna, 281 F. Supp. 388 (S.D. N.Y. 1968); Principe v. Ault, 62 F. Supp. 279 (N.D. Ohio, 1945); Cf. F. R. App. P. 23. It is nonetheless clear, however, that the authority to set bail in a habeas corpus case should be exercised most carefully and only after a detailed showing of exceptional circumstances. Boyer v. City of Orlando, 402 F.2d 966 (5th Cir. 1968); United States ex rel. Epton v. Nenna, supra. In this regard, the well-known dictates of the Bail Reform Act, 18 U.S.C. §3141 et seq. concerning danger of flight and danger to the community are by no means dispositive. When applied to the facts of this action, the case law clearly indicates that bail was improper. According to the cases, a habeas petitioner must do more than merely show that his case presents a substantial legal or factual question. Rather, the court should conduct a two-fold examination of the petition and bail application. Glynn v. Donnelly, 470 F.2d 95 (1st Cir. 1972). By analogy, in the instant case that examination should have covered the merits of Argro's appeal as well as other matters.

As stated by Mr. Justice Douglas upon application for bail in Aronson v. May, 85 S. Ct. 3, 5 (1965):

> This applicant is incarcerated because he has been tried, convicted, and sentenced by a court of law. He now attacks his conviction in a collateral proceeding. It is obvious that a greater showing of special reasons for admission to bail pending review should be required in this kind of case than would be required in a case where applicant had sought to attack by writ of habeas corpus an incarceration not resulting from a judicial determination of guilt. Cf. Yanish v. Barber, 73 S. Ct. 1105, 97 L.Ed. 1637 (1953). In this kind of case it is therefore necessary to inquire whether, in addition to there being substantial questions presented by the appeal, there is some circumstance making this application exceptional and deserving of special treatment in the interests of justice. See Benson v. California, 328 F.2d 159 (C.A. 9, 1965). [emphasis added][decision based upon Supreme Court Rule 49, Subd. 4]

In a similar case before the First Circuit, the court concluded, after analyzing Aronson v. May, supra:

> We would express it in these terms. Both in the district court, and on appeal in the absence of exceptional circumstances--whatever that may include - the court will not grant bail prior to the ultimate final decision unless petitioner presents not merely a clear case on the law, Benson v. California [supra.] but a clear, and readily evident, case on the facts. Merely to find that there is a substantial question is far from enough. Glynn v. Donnelly, supra, 97-98.

Although every court which has considered the issue has not done so in precisely the manner prescribed by the

First Circuit, it is clear that the factors deemed relevant by that court have been implicitly considered elsewhere. For example, on two occasions the Fifth Circuit has granted bail to habeas petitioners who demonstrated exceptional circumstances. In Boyer v. City of Orlando, supra, the petitioner had been convicted in state courts on a misdemeanor charge which appeared to be highly suspect. In order to avoid mootness, the Fifth Circuit granted bail:

> [T]o make Boyer's appeal to the Florida Courts truly effective we have to take extraordinary action . . . . Therefore. . . we order that he immediately be released on bail in an amount, form, and surety to be set by [United States District] Judge Young. 402 F.2d at 968.

In Dawkins v. Crevasse, 391 F.2d 921 (5th Cir. 1968), the court was faced with another Florida case involving a misdemeanor conviction for contempt. The petitioner raised first amendment defenses and was denied bail by state courts and a writ of habeas corpus by the United States District Court. The circuit ordered Judge Harold Carswell to admit the petitioner to bail. See also, Levy v. Parker, 396 U.S. 1204 (1969)(Douglas, J. on application for bail)(substantial questions regarding military law); Johnston v. Marsh, supra, (seriously ill petitioner bailed to private hospital pending

decision on merits of habeas petition); Sims v. Wainwright, supra (bail denied; no extraordinary circumstances).

In Argro v. United States, the petitioner has failed to show the existence of a legal question which, if proven, would entitle him to release. Nor has he presented the court with exceptional circumstances, such as those present above, which would distinguish his petition from the many thousands filed annually in the federal courts. See Baker v. Sard, 420 F.2d 1342 (D.C. Cir. 1969); Administrative Office of United States Courts, Annual Report of the Director, 1973 (Statistics).

In summary, the case law discussed above clearly distinguishes the decision to admit a habeas corpus petitioner to bail from the pre-trial or pre-appeal bail decision. In Argro v. United States, erroneous standards were implicitly or explicity applied by the court--standards which, as applied, constituted an abuse of the court's authority. A conclusion that Argro represents a good bail risk under the language of the Bail Reform Act, 18 U.S.C. § 3141 et seq. or that the state has admitted the individual to bail is not dispositive. (A 63-65) Standing alone such factors should not be sufficient to override the community's compelling interest in executing the criminal judgment. United States ex rel. Epton v. Nenna, supra at 389; see also Aronson v. May, supra.

Hence, the court's order admitting Argro to bail should be vacated.

CONCLUSION

For the reasons stated above, appellant respectfully requests that this Court reverse the holding of the court below requiring the Board of Parole to grant appellee a local revocation hearing and admitting appellee to bail.

Dated:

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

DEBORAH J. AMUNDSEN, being duly sworn, says that on the 11th day of June 1974, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, ~~two~~ ONE copies of the brief for the appellant & appendix of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

William J. Gallagher, Esq.
The Legal Aid Society
Federal Defender Services Unit
606 U.S. Courthouse
Foley Square
New York, New York 10007

Sworn to before me this
11th day of June 1974

Sylvia E. Morris

SYLVIA E. MORRIS
Notary Public, State of New York
No. 24-4503861
Qualified in Kings County
Commission Expires March 30, 19 75

Deborah J. Amundsen

DEBORAH J. AMUNDSEN